Nos. 66 & 67.
Brf. of city matters for Petitioners
Filed Oct. 14, 1895
No.

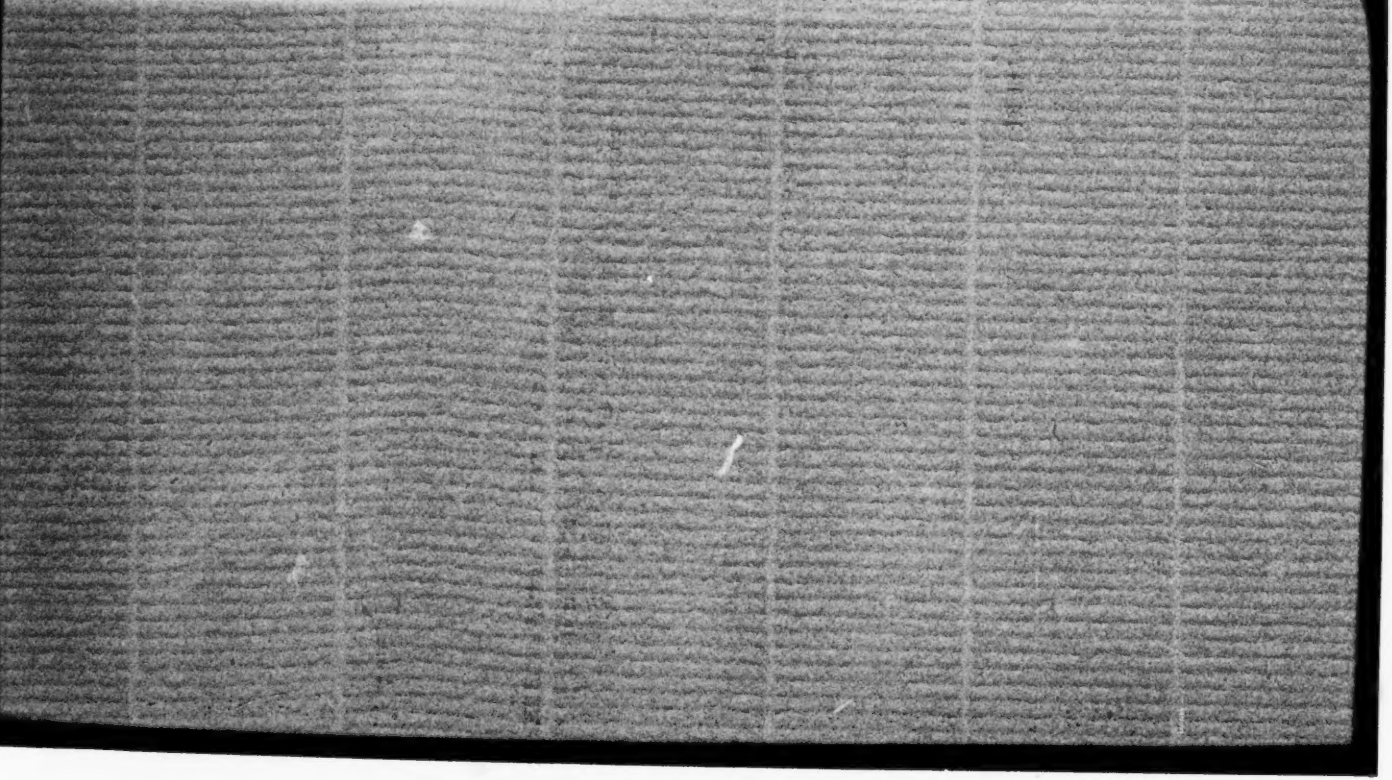
United States Supreme Court.

In the Matter of the Petition of the PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Claimant of the steamship PLYMOTHIAN, for a Writ of Certiorari.

In the Matter of the Petition of JOHN MacINTYRE and others, Claimants of the steamship VICTORY, for a Writ of Certiorari.

Brief in opposition to the Petitions.

BUTLER, STILLMAN & HUBBARD,
Proctors for Plymothian's Cargo.



Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.	No. 757.
IN THE MATTER OF THE PETITION OF JOHN MACINTYRE, JUNIOR, AND OTHERS, CLAIMANTS OF THE STEAMSHIP VICTORY, FOR A WRIT OF CERTIORARI.	No. 758.

Brief of the Canton Insurance Company, Limited, and others, owners of the Plymothian's cargo, in opposition to the foregoing petitions.

On the 12th day of November, 1891, the steamships *Plymothian* and *Victory* came into collision near the mouth of the Elizabeth River between Lambert's Point and Craney Island Light.

At the time of the collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea. She had left Galveston November 1st with a cargo of 3,682 bales of cotton bound to Liverpool, and had in the prosecution of that voyage come in through Hampton Roads and taken coal at Lambert's Point.

By the collision the port side of the *Plymothian* was cut below the water line amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged. The *Victory* sustained damage about her bows, which necessitated repairs.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamship instituted proceedings for limitation of liability.

The value of the *Victory* was appraised at $67,500 and her owners gave stipulation for that amount with sureties resident in New York.

The value of the *Plymothian* was appraised at $33,350 and the value of her freight at $11,871, making a total of $45,221, which has been reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. This has been fixed by consent at $5,000, leaving the limit of her owners' liability at $40,221. Stipulation has been given by the owners of the *Plymothian* with New York sureties.

In response to citations issuing in the above proceedings, the damages arising out of the collision were assessed. The damages sustained by the owners of the *Victory* were assessed at £2,951 12s. 4d., or about $14,500. The damages sustained by the owners of the *Plymothian* were assessed at £8,565 10s. 6d., or about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo were assessed at £14,656, or about $72,000.

The District Court held that the collision was due solely to the fault of those navigating the *Victory*, but that it occurred without any fault of privity on the part of the owners of the *Victory*.

Record, Opinion, pp. 447-458.

The Court further held that the *Plymothian* was in fault for not carrying a lookout, but that such fault did not contribute to the collision *(Record, Opinion, pp. 455, 456)*.

A final decree was accordingly entered October 30, 1894, by which it was decreed that the owners of the *Victory* should have the benefit of the limitation of liability provided by the statutes of the United States, and that the amount of her appraised value be paid ratably to the owners of the *Plymothian* and the owners of the *Plymothian's* cargo in the proportion of the amount of their adjudicated claims *(Record, Decree, pp. 463, 464)*. This gave a dividend of about fifty per cent. upon the amount of the claims.

Appeals were taken from this decree, which came on for hearing before the United States Circuit Court of Appeals for

the Fourth Circuit. That Court held that the collision was due to the fault of those navigating the *Plymothian* as well as to the fault of those navigating the *Victory*, though the greater degree of fault was found to be with those navigating the latter steamer *(Record, Opinion, pp. 498–504)*; and accordingly a decree was entered giving to the owners of the *Plymothian's* cargo a decree for all their damages, to be paid by the *Victory*, to the extent of her value, and the balance to be paid by the *Plymothian (Record, Decree, pp. 513–515)*.

The petition of the Port of Plymouth Steamship Company, owner of the Plymothian, for a writ of certiorari, should be denied.

The writ is petitioned for upon two grounds:

First, that the *Plymothian* was not in fault for the collision.

Second, that the owners of the *Plymothian* were relieved from any liability by the terms of the bills of lading.

First.

THE PLYMOTHIAN WAS IN FAULT AND HER FAULTS CONTRIBUTED TO THE COLLISION.

A. She should have maintained a proper lookout.

She had no one regularly stationed as lookout. Neither her master nor her pilot heard more than one signal of two blasts from the *Victory*.

It is entirely clear that two such signals were blown. Aside from the proofs that came from the *Victory's* witnesses, several of the witnesses produced on behalf of the *Plymohtian* testified that the *Victory* twice blew a signal of two blasts *(Record, John J. Clark, p. 338; Joseph M. Clark, p. 401; Wynne, p. 404; Goodwin, pp. 373, 374)*.

These witnesses, produced by the *Plymothian*, were not as favorably situated for hearing the *Victory's* signals as a lookout on the *Plymothian* would have been.

It is impossible for the *Plymothian* to say that, if there had been a lookout stationed for the special purpose of watching

for vessels and their signals, he would not have heard *all* the signals that the *Victory* gave.

It is equally impossible to say that if the pilot of the *Plymothian* had heard the signal which the *Victory* gave, or if it had been reported to him by a lookout, he would not have earlier recognized his danger. Recognizing his danger, he would have assured safety, either by yielding to the demands of the *Victory*, unreasonable as they were, or by slowing, stopping and reversing his engines and keeping out of the collision.

The rule is that when a clear duty is omitted the burden rests upon the negligent vessel of establishing affirmatively that the omission could not have contributed to the collision.

"In such a case the burden rests upon the ship of showing "not merely that her fault might not have been one of the "causes, or that it probably was not, but that it could not have "been."

The Pennsylvania, 19 Wall., 125.
City of Washington, 92 U. S., 31, 36.

Under cross-signals, it was the duty of both steamers to act instantly for safety; a duty which was recognized by the *Plymothian* when at a later stage she did hear a cross-signal from the *Victory*.

International Rules of Navigation, Art. 18.
U. S. Revised Statutes, § 4233, Rule 21.
Pilot Rule III.
The Baltimore, 56 Fed. Rep., 125.
The Knight, 43 Fed. Rep., 895.
The Aurania, 29 Fed. Rep., 127.
The Frisia, 28 Fed. Rep., 249.
Marsden on Collisions, 2nd Ed., 381–397.

B. The *Plymothian* should have stopped and reversed her engines earlier than she did.

If the *Plymothian* had heard the first signal of two blasts which the *Victory* blew, she would have stopped and reversed then; and if she had stopped and reversed then she would have avoided the collision.

The duty was imposed upon her not only in adjudged cases, but by Pilot Rule III., duly proved in the case *(Record, p. 431)*.

The obligation rested upon the *Plymothian* at once upon the cross-signal being given, to signify by other signals the lack of understanding between the two vessels and to put herself into immediate control by reducing her speed.

The Circuit Court of Appeals found the *Plymothian* in fault for "stubbornly adhering" to her side of the channel and for "doggedly" keeping her course without taking any precaution whatever until too late *(Record, Opinion, pp. 501, 502)*.

And she was found in fault for not earlier giving signals and for not reversing. The Court in fact say:

"We cannot find anything in this record which shows *any* "*precaution* taken by the *Plymothian* when she saw the *Victory* "disregard her signals. * * * The only thing which she "did was to repeat the disregarded signal. Even that was not "done until it became too late to avoid a collision. Under "these circumstances it is impossible to say that the *Ply-*"*mothian* is free from fault" *(Record, Opinion, p. 503)*.

The fact that the *Plymothian* carried high speed at the time of the collision is proved by many witnesses *(Record, Candlish, p. 41; Gilbert, p. 81; Middleton, pp. 96, 97; Scott, p. 109; Stewart, p. 119; Elcoate, p. 140; Swayne, p. 292; Pratt, p. 307; Page, p. 314; Nelson, p. 340)*.

Second.

THE BILLS OF LADING DO NOT RELIEVE THE OWNERS FROM LIABILITY.

It is a fact that all the bills of lading contain what is known as the "negligence clause;" but the position of this Court in respect to such a clause is thoroughly established.

Liv. & G. W. S. S. Co. vs. Phœnix Ins. Co., 129 U. S., 394.

Certain of the bills of lading also contain the "flag clause," to wit, "This contract shall be governed by the law of the flag "of the vessel carrying the goods" *(Record, Stipulation, p. 483)*.

We submit that a printed reference in a general bill of lading to the "law of the flag" is an unreasonable condition and void. A reference to the law of a specific country to which the goods were bound might be sustained, for then the shipper would know just what law he might expect to be administered in governing the contract. When, however, reference is made

to the law of the flag of the carrying vessel and the bills of lading contain, as these did, license to forward "by any other steamship or steamship company" *(Record, pp. 489–496)*, it is apparent that the shipper is deprived of all opportunity of knowledge as to the law governing the contract.

The statement in the *Plymothian's* petition respecting the bills of lading is not quite complete. The petition says:

> "It will appear by stipulation and exhibit *(pp. 483–498)* "that every bill of lading *issued by the master of the Ply-* "*mothian* for the cotton constituting this cargo and injured as "a result of this collision, contained two clauses familiarly known "as the 'negligence clause' and the 'flag clause.'"
>
> *Petition, p. 14.*

The petition omits to state that of the 3,642 bales shipped, only 1,671 were covered by bills of lading "*issued by the master by the Plymothian.*" The greater portion of the cargo, to wit, 1,971 bales, was covered by inland bills of lading issued by railroad companies, providing for through transportation from the port of shipment to Liverpool. None of these bills of lading contain the "flag clause," and they were the only bills of lading touching the 1,971 bales which were ever received by the shipper *(Record, Stipulation, p. 483)*.

The master of the *Plymothian* in receiving these 1,971 bales fsom the railroad companies, did issue a receipt containing the "flag clause," but that was something of which the shippers had no knowledge.

The whole question of the bills of lading is entirely immaterial, inasmuch as *less than half the cargo* is touched by the "flag clause." As the *Plymothian* is only held partly in fault, and cannot in any event, because of her insufficient value, be called upon to pay one-half of the cargo's damage, the question of the application of the "flag clause" is entirely immaterial.

The petition of John MacIntyre, Junior, and others, owners of the Victory, for a writ of certiorari, should be denied.

The petition is applied for on two grounds:

First, that the International Rules of Navigation did not apply in the locality of the collision.

Second, that the *Plymothian* should bear one-half of the cargo's damages up to the limit of her value.

First.

THE VICTORY WAS SO CLEARLY IN FAULT IT IS UNNECESSARY TO DETERMINE WHAT RULES OF NAVIGATION APPLIED. SHE WAS IN FAULT FOR STARBOARDING HER HELM AND FOR ADHERING TO THE EAST OR PORT SIDE OF THE CHANNEL AND FOR NOT EARLIER REVERSING HER ENGINES.

A. The International Rules require, when two vessels are meeting end on or nearly end on, each shall alter her course to starboard—that is, port her helm.

23 U. S. Statutes at Large, Chap. 354, Art. 15.

And they further provide that in narrow channels every steamship shall keep to that side of the mid-channel which lies to the starboard side of the vessel.

23 U. S. Stat. at Large, Chap. 354, Art. 21.

The *Victory* violated both of these rules.

The act establishing these International Rules provides that they shall apply upon the high seas and in all coast waters of the United States, and repeals all laws inconsistent therewith except as to the navigation of vessels in the harbors, lakes and inland waters of the United States.

If the locality of the collision was not in the "coast waters," but in "inland waters," then the provisions of Section 4233 of the Revised Statutes of the United States apply. That section promulgated "rules for preventing collisions on "the water," and it makes exactly the same provisions as the International Rules respecting vessels meeting in a channel end on, or nearly end on.

U. S. Rev. Stat., Sec. 4233, Rule 16.

Under such rules the *Victory* should have ported, instead of which she starboarded.

Exactly the same regulation is found, if it is argued that the vessels should be governed by the Inspector's Rules for Pilots.

Rule I. provides that when vessels are approaching each other head and head, or nearly so, each shall pass to the right *(Record, p. 344)*.

This required the *Victory* to port, instead of which she starboarded.

Rule II. imposed the same obligation upon her of porting in case the vessels were approaching each other in an oblique direction instead of end on *(Record, p. 431)*.

So far as local custom is concerned, such custom is in exact accord with the terms of the International Regulations. Whether the custom is older than the regulations, or whether it is a custom that has grown out of the regulations, does not appear; but in one way or another it is firmly established. By such custom vessels bound up and down the Elizabeth River are required to take that side of the mid-channel which lies to the starboard *(Record, Mardon, pp. 268, 269, 270, 277, 280; Henley, p. 372; Tweddle, pp. 325, 326)*. And the custom was known to the master of the *Victory* (Record, Alcot, pp. 151, 152). The pilot of the *Victory*, though examined at length, did not raise a word of dissent against the proofs that both custom and law required him to proceed up the western side of the channel.

B. The *Victory* was also in fault, under all rules and all customs, in not reversing her engines and stopping when she found that her signals were not assented to by the *Plymothian*.

When did she reverse? Candlish says that the reversing signal was given "a minute or so" after the second signal of the *Victory (Record Candlish, p. 51)*.

The master says that "half a minute" after the second signal he stopped his ship, and then gave three blasts of the whistle and rang his engines to go astern *(Record, Elcoate, p. 136)*.

The half minutes and minutes were very precious at that time, and the highest degree of vigilance and diligence was to be required from the *Victory*. She would have been able to overcome her headway if she had reversed in the first moment of danger. In proceeding on her course she delayed until too late, and when she finally attempted to avoid the collision by reversing she could not control her speed, and she cut fifteen inches into the heavy iron stringer plates of the *Plymothian (Record, Quigley, pp. 420, 421)*.

Second.

AN UNEQUAL DIVISION OR APPORTIONMENT OF DAMAGES IS NOT EXTRAORDINARY.

Article 67 of the Laws of Wisby provides that in cases of two or more vessels being in fault, the damages shall be apportioned *pro rata* according to the degree of fault.

Valin's Laws of Wisby, Art 67.

Such is the not uncommon rule upon the continent of Europe.

Such rule has also been freely applied in the United States in cases of admiralty torts.

The Explorer, 20 Fed. Rep., 135.
The Wanderer, 20 Fed. Rep., 140.
The Max Morris, 24 Fed. Rep., 860.

The case last cited was affirmed in the United States Circuit Court and in the United States Supreme Court.

The Max Morris, 28 Fed. Rep., 881.
The Max Morris, 137 U. S., 1.

And in a collision case three-fourths of the damages has been thrown upon one vessel, and one-fourth upon the other, solely because of the great disparity of fault.

The Mary Ida, 20 Fed. Rep., 741, 747.

The result of throwing a greater burden upon one vessel than upon another, in order to afford complete indemnity to owners of cargo or to other persons who have sustained damage though free from fault themselves, has been frequent.

The Washington and The Gregory, 9 Wall., 513, 516.
The Alabama and The Game Cock, 92 U. S., 695.
The Hartford and The Unit, 97 U. S., 323.
The Sterling and The Equator, 106 U. S., 647.

The more frequent practice undoubtedly follows the rule of equal division, which would require the *Victory* to pay one-half of the cargo's damage together with one-half of the *Plymothian's* damage.

Even after crediting the *Victory* with one-half of her own damages, the net amount which she would under the ordinary rule be required to pay would amount to over $63,000. The amount which she is called upon to pay is only a few thousand

dollars more, not a sufficient difference to call for the intervention of this Court.

The owners of the cargo being free from fault should receive full and immediate compensation.

First.

The cargo was entirely innocent, and it would be inequitable to defer satisfaction of her claims for two or three years more pending the determination of the proportions to be paid by each of the two guilty vessels. We submit that the Court, if inclined to consider further the equities between the vessels, should direct the immediate payment of the cargo's claims and the relief of the cargo from further litigation, according to the terms of the decree of the United States Court of Appeals. Any equities between the two vessels may be preserved for future adjustment by appropriate order.

Under a writ of *certiorari* the questions to be brought before the Court may properly be limited.

Second.

In case the Court directs that a writ of *certiorari* issue with the effect of deferring satisfaction of the cargo's claims, provision should be made for further bonds to secure the claims of the cargo.

The value of the *Victory* is insufficient of itself to pay the cargo's claims, and the value of the *Plymothian* and her freight is not sufficient to pay one-half the cargo's claims. In both cases the sureties given by the steamers are non-residents of the Eastern District of Virginia, being residents of New York. The sureties are bound only to the face amount of their stipulation, exclusive of interest at least up to the time of decree.

In order to avoid any question as to responsibility for accumulations of interest subsequent to the decree of the

United States Circuit Court of Appeals, the petitioners should be required to renew their bonds with new sureties, making specific provision for payment of such interest and costs.

Third.

BOTH PETITIONS SHOULD BE DENIED.

BUTLER, STILLMAN & HUBBARD,
Proctors for Cargo.

WILHELMUS MYNDERSE,
Advocate.